United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1073

DOCKET NO. 76-1073

UNITED STATES COURT OF APPEALS

Second Circuit

UNITED STATES OF AMERICA,

Appellee, DOCKET NO. 76-1073

-against-

HOWARD P. GISKIN,

Appellant.

PETITION FOR REHEARING IN BANC

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Petition for Rehearing in Banc

APPENDIX

HOWARD P. GISKIN, Appellant-Defendant, respectfully petitions this Court for a re-hearing in banc of its decision of May 25, 1976, in the above entitled case.

In a summary judgment signed by Circuit Judges Hon. J. Joseph Smith, Hon. Paul R. Hays and Hon. Thomas J. Meskill, the Court held that the judgment of the District Court was affirmed; that the affidavit in support of the search warrant was sufficient to support the magistrate's conclusion that there was probable cause to believe that the manufacturing of controlled drugs was occuring illegally at the Giskin residence; that the reliability of the prosecution's confidential informant was sufficiently established in the affidavit; and that the search warrant sufficiently described the premises to be searched; that by a plea of guilty a waiver was effective as to motions in connection with a bill of particulars; and that the length of the sentence being within the statutes permissible limits was not subject to review.

STATEMENT OF FACTS

The issues in this petition are five-fold:

Whether there was probable cause for the issuance of the search warrant.

Whether the warrant, itself, was defective in not describing with specificity the place to be searched.

Whether the sentence was excessive.

Whether the Court erred in not granting a complete disclosure as requested in the Bill of Particulars.

Whether the defendant was given the opportunity to address the Court prior to sentencing.

Factually, the chronological sequence of events seems to be:

In May of 1975, a Howard Cooper representing Educational Research, P.O. Box 721, Saranac Lake, New York, placed an order of phenyl-2-propanone along with laboratory equipment. The contact telephone number for Howard Cooper was listed to Howard Giskin, Herron Hill Road, Dannemora, New York. The Special Agent Benny T. Mangor, who obtained the search warrant, believed that P.O. Box 721, Saranac Lake, New York and Literary Aids, Inc., Richmond, Vermont, were subterfuge addresses used to order precursors to manufacture methamphetamine. That on or about 4 p.m. on July 28, 1975, an informant, who has demonstrated a pattern of reliability in the past, was met at the front door of the Giskin residence by an unknown male who had white flakes in his hair and beard. The informant also smelled a chemical odor which he described as a putrefied odor (the affidavit is devoid of any allegations showing how these facts were brought to the personal attention of the affiant).

On the evening of August 28, 1975, the affiant learned from DEA Chemist, Jack Fasanello that a "putrefied odor" is indicative of amine free bases such as amphetamine or methamphetamine. (See affidavit to obtain search warrant).

A search warrant was obtained and then, according to Special Agent-in-Charge Thomas M. Fitzpatrick, who testified at the Probable Cause hearing before Magistrate Henry Van Acker, he went to the defendant's home with the warrant and, at page 5 of the

Probable Cause hearing where "B.O." stands for Attorney J. Byron O'Connell and "F" is Fitzpatrick, the witness and the uniformed troopers, New York State Police, knocked at the door and asked the defendant if they could use the telephone; at that point the defendant opened the door and Mr. Fitzpatrick entered between the two troopers and told the defendant that they were Federal Officers with a search warrant. Subsequently the 10 ounces of methamphetamine described in the Indictment was taken into the custody of the Federal Officers. Mr. Fitzpatrick also testified at page 8 that there was evidence that Mr. Giskin's wife probably had resided with him there at one time and there was evidence that a female friend had stayed there at one time which was verified by Mr. Giskin and further the place appeared to have been a place where other people were at various times. Mr. Fitzpatrick further testified at page 9 of the Probable Cause hearing that there was another place about 500 feet closer to Route 374 which was an A-frame cottage. Mr. Fitzpatrick further testified that he made his inventory and slid a copy of the search warrant with the inventory on it under the door (page 17).

Mr. Mangor testified that he signed the affidavit with the search warrant before Judge Van Acker. He testified that (at page 23) no one was produced before Judge Van Acker to be examined under oath personally before the issuance of a search warrant. He testified he got the search warrant at 1:30 a.m. August 29, 1975 (a nighttime search); that he left the affidavit with the Judge; he testified (at page 22 and 23) on the basis of the affidavit, the search warrant was issued. He testified he did not give the Judge

any further information. At pages 22 and 23, "M" stands for Mangor and "B.O."stands for Byron O'Connell. At page 27, he was asked what knowledge he had to take this affidavit before his Honor, referring to the Magistrate, for a search warrant, and he answered through investigations conducted by Agnets of DEA and he was asked did you conduct, did you make this investigation yourself and he answered not that particular facet of the investigation. At page 29, Agent Mangor was asked about his affidavit by this writer when I asked him "and then you say on July 28th at 4 p.m. an informant who had demonstrated a pattern of reliability in the past was greeted at the front door of the Giskin residence by an unknown male who had white flakes of an unknown substance. How did this informant advise you of this or did he advise somebody else of this?" Mangor answered that the informant advised someone else of this and so I asked "he didn't advise you at all" and he answered "correct".

It would, therefore, appear that the affidavit for the search warrant contained information as to what the informant "who had demonstrated a pattern of reliability in the past" told someone else about what he smelled and what he saw and that someone else told affiant and that affiant made the allegations in his affidavit.

The informant, by his own admissions, (at page 81 of the Suppression Hearing minutes) did make a report of his observations to Mr. Fitzpatrick rather than to Mr. Mangor and Mr. Fitzpatrick did not make the affidavit before the Magistrate.

At page 75, the informant admits he operates as an agent for the DEA on a contingency fee basis. contingent upon a conviction. The informant admits (at page 76) he didn't go to the door of Mr.

Giskin's house, so obviously he didn't look into Mr. Giskin's house to actually see anything happening. He does not tell us where the stench of putrefaction like a decaying body, came from. In an attempt to bolster him, the Assistant U. S. Attorney, Mr. Cullum has him testify (at page 82) that he has worked on a hundred cases with Mr. Fitzpatrick and obtained three Federal convictions relating to narcotic offenses. This information was never relayed to Judge Van Acker.

The Government Chemist, Jack Fasanello, when called as a witness as the Suppression Hearing, admitted that the putrefied odor could have been a dead body or rotting meat, and admitted he told Mangor it was a good probability (page 72) that amphetamine or methamphetamine was being produced and he didn't know how good a possibility it was that rotting flesh was upon the premises.

Witness Dragoon testifying for the defense, identified the defendant's home from photographs which were exhibits and testified that there were other bearded males on the premises and there was an odor of rotting flesh from garbage in the yard during the summer of 1975.

Witness Sharron Giskin testified that she was the co-owner of the premises which were searched and she identified photographs of the premises that were searched. She testified that there was a garbage truck in the front yard that exuded the smell of rotting meat and she testified as to four other males with beards besides her husband who occupied the premises.

Witness Barber, a land surveyor, testified as to the location of another similar house owned by Margaret Nash or Mildred Nash on the same side of the Herron Hill Road approximately 1.13 miles from Route 374 and that the defendant's home was 1.24 miles or almost 1.3 miles. He testified further that the homes were almost identical.

The search warrant, itself, simply said Howard Giskin's residence, it did not say a home owned by Howard Giskin and Sharron Giskin. Certainly the Government had no authority from Sharron Giskin to go into the home occupied by her husband and owned by herself and her husband, nor were they arresting Sharron Giskin, nor did they have a search warrant addressed against Sharron Giskin.

The defendant was indicted on the basis of the 10 ounces of methemphetamine which were found in his residence on the Herron Hill Road on August 29, 1975 by a U. S. Grand Jury. He appeared for arraignment before Mr. Justice James E. Foley on December 1, 1975, and the case was sent from Albany to Utica for a hearing on the defendant's Motion for Suppression and the defendant's Motion for a Bill of Particulars. Judge Port heard the Motion for Suppression on January 14, 1976, and decided the same on January 19, 1976; that the defendant under the procedure approved by the United States Court of Appeals, Second Circuit, U.S. v. Burks, 517 F 2d 377, pled guilty and was sentenced on January 30, 1976. He was sentenced to a term of three years, at least six months of which would have to be served in a Federal institution; he is currently free on bail pending disposition of his case upon the constitutional ground throughout the Appellate Court system.

POINT I

APPELLANT WAS SENTENCED AS A FIRST OFFENDER TO 3 YEARS, 6 MONTHS OF WHICH HE WOULD HAVE TO DO BY THE HON. EDMUND PORT, NORTHERN DISTRICT OF NEW YORK, ON JANUARY 30, 1976, AFTER PLEADING GUILTY AFTER HIS SUPPRESSION MOTION WAS DENIED AFTER HEARING.

Appellant pled guilty to violation of Title 21, Section 841(a)U.S. Code, manufacturing and possession of controlled substance under Schedule II (methamphetamine) with attempt to distribute between June 26, 1975, and August 29, 1975. He was sentenced on June 30, 1976, to three years in the custody of the Attorney General or his representative upon condition that he would be confined to a jail type treatment institution for a period of at least six months and the balance was probation or parole.

The appellant, after the suppression hearing, rather than go through an expensive trial, pled guilty, preserving his rights to appeal and withdraw his plea if there should be a reversal. The indictment covers the period to the date of the search warrant on August 29, 1975. The search warrant return indicates the warrant was received 1:30 A.M. on August 29, 1975, and executed at 4:40 A.M. on August 29, 1975. The search warrant says probable cause exists for the search of the appellant's premises for an illicit laboratory manufacturing methamphetamine. The search warrant O.K's the search of premises known as Howard Giskin's residence, a redwood panelled cottage structure with a glass front and porch, located by travelling west on Route 374, making the first left turn, after leaving the Village of Dannemora, in Clinton County, New York, proceeding on a tar

road, 1.2 miles, with the residence being on the right side of the road.

The search warrant was signed by Henry Van Acker, Jr., U. S. Magistrate. The search warrant says the Judge was satisfied of the probable cause because of the affidavit of Special Drug Enforcement Administration Agent, Benny T. Mangor. The affidavit of Benny T. Mangor says he has reason to believe that in Howard Giskin's residence, described as above, there is an illicit laboratory manufacturing methamphetamine. It tells Judge Van Acker the facts tending to establish the grounds for issuing the warrant, or that (a) between May 7, 1975, and August 29, 1975, Giskin and others conspired to violate 21 USC 846 and further in furtherance thereof the defendants possessed with intent to distribute Schedule I drugs and further in furtherance of the conspiracy, one Howard Cooper placed an order for phenyl-2-propanone and laboratory equipment where subterfuge addresses were used to order the precursors used to manufacture methamphetamine. The agent still does not tell the magistrate that this phenyl-2-propanone was a precursor of methamphetamine and a legal drug and the significance of the laboratory equipment.

Proceeding further with the affidavit, DEA Agent Mangor tells Judge Van Acker under oath (later he tells us the date is wrong, and admits the implication either error or perjury) that on July 28, 1975, at 4 P.M. an informant, (whose fee for informing is contingent upon conviction we later learn) who has demonstrated a pattern of reliability in the past was greeted at the front door of the Giskin residence by an unknown man. There is no recital that this was the defendant who had white flakes of an unknown substance scattered on his hair and beard.

his hair and beard. There is no recital that this was anything other than dandruff.

The informant further smelled the strong chemical odor which could have been rotting flesh. What the contingent fee informant with his previous pattern of reliability smelled and saw was consistent with many things. But he saw no drugs in any state of manufacture, he saw no crime being committed, he obtained no admission from whoever met him at the door. He neither purchased nor agreed to purchase any illegal drug or controlled substance Schedule I or II.

The contingent fee informer did not give this information to affiant so the affiant could relate it directly to the U. S. Magistrate Van Acker. It went to a Special Agent in Charge, Thomas Fitzpatrick, then to Mangor, then to Judge Van Acker. Then on August 28, 1975, a month and a day subsequent to the sworn time that the smell and sight observations of the informant were recorded, the affiant called a U.S. Government Chemist Fasanello who told him that the putrified odor like rotten flesh was indicative of amine free bases such as amphetamine or methamphetamine. The appellant was indicted for the 10 ounces found when the search took place.

As errors, we urge upon this Court that there was no probable cause as required in the Fourth Amendment for the issuance of a search warrant on the facts presented. The conclusion is inescapable that Magistrate Van Acker did not exercise a neutral and detached opinion as required by the cases. He merely rubber-stamped police activities. The only connection of the appellant was a telephone number listed to him, the sight and smell observations of the informant at the defendant's residence, and an hypothetical opinion of a chemist. The order of phenyl-2-propanone was the order of a legal

drug.

There is no showing to the Magistrate that this was precursor to a legal drug, or that Howard Cooper had anything to do with the defendant or the defendant's residence. The hearsay of the informant was compounded by further hearsay that was given to the Judge by someone who had heard what the informant had said to another through that other person. The pattern of reliability in three out of 100 cases was never related to the Magistrate. That the putrified odor was indicative of methamphetamine did not definitely establish methamphetamine.

The DEA people did not even advise that they had a search warrant, but entered under the pretense of using the telephone. They knew other people had lived there, including other people with beards. The smell was never said to have come from the door or from the premises. The informant did not even go to the door.

The cases of Aguilar vs. Texas and Spinelli vs. U.S. would seem controlling with reference to the informant. In fact, in all of the cases, including the Ventresca case and the Freeman case, the informers actually knew there was a crime being committed. In this case, the informant really did not have anything to inform about. Mangor testified at the probable cause hearing that noone was examined under or before the Magistrate who issued the warrant and the only information he gave the Judge was the affidavit. Mangor either committed perjury at the probable cause hearing, the suppression hearing or in the affidavit, and if the affidavit was perjurious the warrant should not have been issued.

The employment of contingent fee informers by the United States opens the door to those who would tell on many to catch a few, and tell on the innocent, and permit unconstitutional searches of the dwellings of the innocent people. There is no corroboration of the informant's tale, no separate checking of his tale, no probable cause. There is only a suspicious inference and the facts developed at the suppression hearing were not enough to ripen into judgment.

There was no corroboration here as there was in the Jones case through other sources reducing the chances of a reckless or prevaricated tale. There was no previous reliability stated or proven and the defendant was not a known criminal. The police are not appropriate guardians of privacy. Only the Courts are. This is so even though the aims of the police are worthy. In the Ventresca case relied on by the government, there was a detailed affidavit, not from contingent fee informers, but from U.S. officials and law officers.

During the oral argument the government admitted this was a weak case and relied upon the case of Freeman vs. the U.S. decided by this Court at 358 F 2nd 459. In that case, the informant actually saw the heroin and the government agent had seen the defendant meeting with known addicts and seen him transferring narcotics to heroin addicts. There was a substantial basis for crediting the hearsay. Not so in the case at bar.

In conclusion, for all the reasons set forth above, and in our papers previously submitted, and on file with this Court, this petition should be granted, and the judgment of conviction appealed from, after

denial of the suppression motion should be reviewed by this Court sitting in banc.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fifth day of May, one thousand nine hundred and seventy-six.

PRESENT:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL,

Circuit Judges,

UNITED STATES OF AMERICA,	:	
Appellee,	:	
v.	:	Docket No. 76-1073
HOWARD GISKIN,	:	
Appellant.	:	

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The affidavit in support of the search warrant contained factual allegations sufficient to support the magistrate's conclusion that there was probable cause to believe that the manufacturing of controlled drugs was occurring illegally at the Giskin residence. The reliability of the prosecution's confidential informant was sufficiently established in the affidavit. Finally, the search warrant sufficiently described the premises to be searched.

Appellant's argument that the district court erred in denying motions in connection with a bill of particulars was waived by his plea of guilty. The length of the sentence imposed upon the appellant, being within the statute's permissible limits, is not subject to review.

J. JOSEPH SMITH

PAUL R. HAYS

THOMAS J. MESKILL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-agsinst-

HOWARD P. GISKIN,

Appellant.

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AFFIDAVIT OF SERVICE

Docket No.
76-1073

STATE OF NEW YORK
ss:
COUNTY OF CLINTON

GLADYS T. BOMBARD being duly sworn, deposes and says: That deponent is not a party to the action, is over 18 years of age and resides at Keeseville, New York; that on the 2nd day of June 1976 deponent served the within two copies of Petition for Rehearing In Banc upon James M. Cullum, Assistant U.S. Attorney, the attorney for the appellee in this action, at U. S. Attorney's Office, U. S. Courthouse and Post Office Building, Albany, New York, by depositing two true copies of the same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the U. S. Post Office Department within the State of New York.

Gladys T. Bombard

Sworn to before me this
2nd day of June, 1976.

June C. Seymour
NOTARY PUBLIC

JUNE C. SEYMOUR
Notary Public, State of New York
Residing in the County of Clinton
My Commission Expires March 30, 1978